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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

JARRELL RAYVON ALLEN,

Defendant and Appellant.

E071232

(Super.Ct.No. BAF1700726)

OPINION

APPEAL from the Superior Court of Riverside County. Jeffrey Prevost, Judge.

Affirmed with directions.

William G. Holzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Michael Pulos and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

## I.

### INTRODUCTION

Defendant and appellant, Jarrell Rayvon Allen, was tried by a jury and convicted of three separate felonies, including burglary of an inhabited dwelling while another person was present. Defendant was sentenced to a total prison term of nine years, which included a strike and a five-year serious felony enhancement. Defendant timely appealed.

On appeal, defendant argues his sentence should be remanded to permit the trial court to take into account a change in the law which made imposition of the five-year term for a prior serious felony conviction discretionary. The People agree. We remand for resentencing.

## II.

### FACTUAL AND PROCEDURAL BACKGROUND

On June 30, 2017, defendant got into an argument with his cohabitating pregnant girlfriend, Jane Doe (Doe). Doe took defendant's cell phone and departed their shared residence for her grandmother's house. Defendant followed Doe, and both Doe and defendant had a physical altercation outside their apartment complex that ended when defendant pushed Doe to the ground. Doe continued to the grandmother's house, but defendant stopped following her.

Doe eventually arrived at her grandmother's house and was let in by her mother and her mother's boyfriend. Defendant arrived about 30 minutes later. Doe initially

refused him entry, but defendant eventually entered the house by bending the screen door frame. The two then argued some more, and defendant grabbed Doe by the neck and shoved her against a wall. This alerted the mother's boyfriend, who confronted defendant and ordered him to leave the house. The mother's boyfriend then called the police.

Police apprehended defendant in his car leaving the apartment complex shortly afterward. When defendant eventually exited the car, the officer saw a four and one-half inch kitchen knife on the seat that was previously concealed under defendant's leg. The officer placed defendant under arrest.

On October 6, 2017 the Riverside County District Attorney filed a first amended information charging defendant with one count of burglary of an inhabited dwelling while another person was present (Pen. Code, §§ 459, 667.5, subd. (c)(21);<sup>1</sup> count 1) inflicting corporal injury on a victim (§ 273.5, subd. (a); count 2), and concealing a dirk or dagger (§ 21310; count 3). The information also alleged that defendant had a prior serious felony conviction (§ 667, subd. (a)) and a prior strike (§§ 667, subds. (c), (e)(1), 1170.12 subd. (c)(1)).

On January 2, 2018, after trial, a jury found defendant guilty on all counts. The next day defendant admitted to the prior serious felony conviction and strike enhancements.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

The court sentenced defendant to two years on count 1, doubled to four years due to the strike allegation. It imposed and stayed a three-year sentence for count 2. It also imposed a concurrent term of two years for count 3. Finally, the court imposed the then mandatory five-year serious felony enhancement. In doing so, the court stated “[w]ith respect to the so-called nickel prior, that will be imposed. That’s mandatory at this time. If I had the discretion to strike it, I would strike it, but I do not have that discretion.”

Defendant filed his notice of appeal on August 30, 2018.

### III.

#### DISCUSSION

Defendant argues this case should be remanded for resentencing because recent changes in the law which make imposing the five-year serious felony enhancement discretionary apply to defendant retroactively. The People concede that these changes are retroactive and that this case should be remanded for resentencing. We agree with the parties.

Senate Bill No. 1393 (2017-2018 Reg. Sess.) (S.B. 1393) was enacted effective January 1, 2019. The legislation amended sections 667, subdivision (a) and 1385, subdivision (b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) Under the former versions of sections 667, subdivision (a) and 1385, subdivision (b), courts were required to impose a five-year consecutive term for “[a]ny person convicted of a serious felony who previously has been convicted of a serious felony . . . .” (Former

§ 667, subd. (a).) The court had no discretion “to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under [s]ection 667.” (Former § 1385, subd. (b).)

As a panel of this court recently determined in *People v. Garcia* (2018) 28 Cal.App.5th 961, S.B. 1393 is retroactive to judgments of conviction which are not yet final as of the effective date. (*People v. Garcia, supra*, at p. 973 “[U]nder the *Estrada*<sup>[2]</sup> rule, as applied in *Lara*<sup>[3]</sup> and *Francis*,<sup>[4]</sup> it is appropriate to infer, as a matter of statutory construction, that the Legislature intended [S.B.] 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when [S.B.] 1393 becomes effective on January 1, 2019.”]; see *People v. Garcia, supra*, at pp. 971-973.) A case does not become final “until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed.” (*People v. Viera* (2005) 35 Cal.4th 264, 305-306.)

“Defendants are entitled to sentencing decisions made in the exercise of the “informed discretion” of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that “informed discretion” than one whose sentence is or may have been based on misinformation . . . .” (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391, quoting *People v. Belmontes* (1983) 34 Cal.3d

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<sup>2</sup> *In re Estrada* (1965) 63 Cal.2d 740.

<sup>3</sup> *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299.

<sup>4</sup> *People v. Francis* (1969) 71 Cal.2d 66.

335, 348, fn. 8.) Thus, where a court previously had no discretion to impose or not impose a certain sentence and now does, “the appropriate remedy is to remand for resentencing unless the record ‘clearly indicate[s]’ that the trial court would have reached the same conclusion ‘even if it had been aware that it had such discretion.’” (*People v. Gutierrez, supra*, at p. 1391, quoting *People v. Belmontes, supra*, at p. 348, fn. 8.)

Indeed, under such circumstances remand is “the usual custom.” (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1105.) This principle has been applied in cases involving newfound discretion to strike three strikes prior convictions (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896) and firearm enhancements (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425; *People v. Chavez* (2018) 22 Cal.App.5th 663, 713).

In this case, the sentencing court unequivocally stated that if it had had the discretion to strike the five-year prior serious felony enhancement it would have. Therefore, there is no question that the trial court would have reached a different conclusion if it had had discretion to do so.

Accordingly, we find there is a clear indication that the trial court would have reached a different conclusion if it had discretion at the time of sentencing and that therefore remand is appropriate.

IV.

DISPOSITION

The conviction is affirmed. The matter is remanded to permit the trial court to determine whether to strike the enhancement under Penal Code section 667, subdivision (a) and to resentence defendant accordingly. In all other respects the judgment is affirmed.

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FIELDS  
J.

We concur:

RAMIREZ  
P. J.

McKINSTER  
J.